

The Right to Counsel in Criminal Investigations

*“To bring in a lawyer means a real peril to solution of the crime . . .”*¹

In the course of a criminal investigation, officers will sometimes encounter the culprit’s attorney. From their perspective, this is not a positive development. After all, under our criminal justice system, the perpetrator’s lawyer has absolutely no interest in seeing that his client is brought to justice. In fact, it’s his job to see that the case winds up in the “unsolved” file. As Justice Jackson observed in *Watts v. Indiana*:

[U]nder our adversary system, [a lawyer] deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem.²

To accomplish their objectives, lawyers may arrive on the scene full of bluff and bluster, assuming the role of a knowledgeable and commanding presence whose pronouncements carry the force of law. The real obnoxious ones might say something like, “I forbid you to question my client,” or “I shall not allow you to place my client in your lineup.”

In situations such as these, officers need to know whether they must defer to the attorney, or whether they can safely ignore his demands and send him on his way. More to the point, they need to know when a suspect has a constitutional right to counsel. That’s because it is the *right* to counsel—not counsel’s arrival—that can affect the manner in which they conduct their investigations.

At the outset, it should be noted there are actually two constitutional rights to counsel. One is the familiar *Miranda* or Fifth Amendment right. The other is the less well-known Sixth Amendment right, which is the subject of this article.³ Here is a summary of what they do.

¹ *Watts v. Indiana* (1949) 338 U.S. 49, 59 (conc. opn. of Jackson, J.).

² *Watts v. Indiana* (1949) 338 U.S. 49, 59 (conc. opn. of Jackson, J.). ALSO SEE *United States v. Wade* (1967) 388 U.S. 218, 256 (dis. opn. of White, J.) [“Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. . . . But defense counsel has no comparable obligation to ascertain or present the truth.”].

³ See *Michigan v. Jackson* (1986) 475 U.S. 625, 633, fn.7 [“Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not.”]; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177-8; *Patterson v. Illinois* (1988) 487 U.S. 285, 297 [“While our cases have recognized a ‘difference’ between the Fifth Amendment [*Miranda*] and Sixth Amendment rights to counsel, and the policies behind these constitutional guarantees, we have never suggested that one right is ‘superior’ or ‘greater’ than the other”]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 300, fn.4 [“[T]he policies underlying the two constitutional protections are quite distinct.”].

SIXTH AMENDMENT: The Sixth Amendment right to counsel was initially intended to make sure that defendants could have an attorney when they went to trial.⁴ In fact, the relevant language in the Sixth Amendment simply states, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”⁵

Over the years, however, the United States Supreme Court expanded this right to cover certain “critical” confrontations between suspects and officers or prosecutors.⁶ As the Court explained:

This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that . . . might well settle the accused's fate and reduce the trial itself to a mere formality.⁷

As we will discuss later, these critical pretrial events consist of, (1) police interrogations, (2) questioning by police agents, (3) lineups, (4) consent searches, and (5) plea negotiations.

MIRANDA: The *Miranda* right to counsel is concerned with only one of these critical confrontations: police interrogation. And it is only interested in those interrogations that occur when the suspect is in custody. Furthermore, unlike the Sixth Amendment, *Miranda* does not care how interrogations might seal the suspect's “fate” or interfere with the attorney-client relationship. Instead, its only objective is to reduce the coercive pressures that are inherent in interrogations that occur after a suspect has been taken into custody—regardless of whether he has an attorney or whether he has been charged with the crime under investigation.⁸ It accomplishes this by giving the suspect a right to talk with an attorney before questioning, and to have one present when it occurs.⁹

⁴ See *Maine v. Moulton* (1985) 474 U.S. 159, 170 [“[T]he assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”]; *Michigan v. Harvey* (1990) 494 U.S. 344, 348 [“The essence of [the Sixth Amendment right to counsel] is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.”]; *United States v. Ash* (1973) 413 U.S. 300, 309 [“[T]he core purpose of the counsel guarantee was to assure ‘Assistance’ at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.”].

⁵ See *United States v. Wade* (1967) 388 U.S. 218, 224-5.

⁶ See *Maine v. Moulton* (1985) 474 U.S. 159, 170 [“[W]e have found that the [Sixth Amendment right to counsel] attaches at earlier, ‘critical’ stages in the criminal justice process where the results might well settle the accused's fate and reduce the trial itself to a mere formality.”]; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 [“The purpose of the Sixth Amendment counsel guarantee . . . is to protect the unaided layman at critical confrontations with his expert adversary, the government”]. ALSO SEE *Beaty v. Stewart* (9th Cir. 2002) 303 F.3d 975, 991-2 [“A ‘critical stage’ is a trial-like confrontation, in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice.”].

⁷ *United States v. Ash* (1973) 413 U.S. 300, 310.

⁸ See *Miranda v. Arizona* (1966) 384 U.S. 436, 467 [“[T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons . . . from being compelled to incriminate themselves.”]; *People v. Michael B.* (1981) 125 Cal.App.3d 790, 794 [“[The Sixth Amendment] differs from *Miranda*'s Fifth Amendment protection, which seeks to prevent undue pressure upon the defendant”]; *People v. Acuna* (1988) 204 Cal.App.3d 602, 607 [“[The *Miranda*] right to counsel is not an independent right, but rather a prophylactic rule derived from Fifth Amendment principles and not from the Sixth Amendment right to counsel which attaches only upon the filing of formal criminal charges.”]; *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203 [“In contrast [to the Sixth Amendment], the Fifth Amendment protects a quite different interest: the suspect's desire to deal with the police only through counsel.”].

⁹ See *Duckworth v. Eagan* (1989) 492 U.S. 195, 204 [*Miranda* requires “that the suspect be informed that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one.”].

Another difference is that officers seem to have a good grasp of the *Miranda* right to counsel, while the Sixth Amendment can be perplexing. That's partly because they deal with *Miranda* on a regular basis, while they confront the Sixth Amendment only when an investigation continues on after the suspect has been charged. Moreover, the Sixth Amendment can be scary because the cases in which post-charging investigations are necessary tend to be quite serious or complex, which means that Sixth Amendment violations can be devastating.

Still, there are really only two things that officers and prosecutors need to know about the Sixth Amendment right to counsel: (1) when it attaches, and (2) how attachment restricts what they may do.

WHEN THE RIGHT ATTACHES

A suspect acquires a right to counsel under the Sixth Amendment when a "prosecution is commenced" against him.¹⁰ And this occurs when either of the following happens: (1) a prosecutor files a complaint against him,¹¹ or (2) he is indicted by a grand jury.¹² If neither has occurred, the suspect simply has no Sixth Amendment rights.¹³

The reason these actions give rise to the right to counsel is that they signify a commitment by prosecutors to proceed with "adversarial judicial proceedings" against the suspect.¹⁴ As the court noted in *People v. Viray*, "[B]y filing a complaint the prosecutor, in a wholly concrete and practical sense, commits the state to prosecute."¹⁵

¹⁰ See *Texas v. Cobb* (2001) 532 U.S. 162, 167; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175.

¹¹ See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1197 ["The complaint unconditionally commences an adversarial criminal process for purposes of *Massiah*."]; *People v. Superior Court (Sosa)* (1983) 145 Cal.App.3d 581, 593 ["A prosecution has reached a critical stage after a complaint has been filed."]; *People v. Riskin* (2006) 143 Cal.App.4th 234, 243 [right to counsel attached upon filing of criminal complaint]; *People v. Lebell* (1979) 89 Cal.App.3d 772, 778 ["adversary judicial process" commenced by "filed complaint"]; *People v. Reese* (1981) 121 Cal.App.3d 606, 611 ["The filing of a felony complaint in California starts the criminal proceeding"]; *People v. Case* (1980) 105 Cal.App.3d 826, 833 ["The only method of initiating a criminal proceeding in California is the filing of an accusatory pleading in the court having trial jurisdiction over the charged offense."]; Pen. C. § 691(c) ["The words 'accusatory pleading' include an indictment, an information, an accusation, and a complaint."].

¹² See *People v. Viray* (2006) 134 Cal.App.4th 1186, 1195 ["In federal courts [the Sixth Amendment right to counsel] typically takes effect upon indictment."]; *U.S. v. Spruill* (7th Cir. 2002) 296 F.3d 580, 585 ["Adversarial proceedings were initiated against Spruill when he was indicted"]; *U.S. v. Harrison* (9th Cir. 2000) 213 F.3d 1206, 1210; *U.S. v. Mapp* (2nd Cir. 1999) 170 F.3d 328, 334 ["[T]he federal prosecution of Moore was not commenced until the federal indictment was handed down"].

¹³ **NOTE:** Over the years, some confusion resulted from the United States Supreme Court's repeated statement that the Sixth Amendment right to counsel arises when judicial proceedings have been initiated against the suspect "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." See, for example, *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *Moore v. Illinois* (1977) 434 U.S. 220, 226. But because the Sixth Amendment right to counsel attaches when a complaint is filed, the Court's references to the preliminary hearing, information, and arraignment—all of which will occur only if, and well after, a complaint has been filed—make no sense. See *People v. Viray* (2006) 134 Cal.App.4th 1186, 1196-7 ["[I]n California, the filing of a felony complaint makes arraignment virtually inevitable."]; *People v. Reese* (1981) 121 Cal.App.3d 606, 611 ["The enumeration in *Kirby* and *Moore* of events which will start a criminal prosecution is in the disjunctive. The return of an indictment or the filing of an information invokes the right to counsel, even before the defendant is arraigned."]. ALSO SEE *U.S. v. Hayes* (9th Cir. 2000) 231 U.S. 663, 675 ["This is a clean and clear rule that is easy enough to follow"]; *U.S. v. Moody* (6th Cir. 2000) 206 F.3d 609, 614 ["[This] is a bright line test"].

¹⁴ See *Kirby v. Illinois* (1972) 406 U.S. 682, 688 ["[The Sixth Amendment right to counsel] attaches only at or after the time that adversary judicial proceedings have been initiated against him."]; *United States v. Gouveia* (1984) 467 U.S. 180, 189 [upon the initiation of adversary judicial criminal proceedings "the government has

To put it another way, charging represents a dramatic shift in the proceedings from criminal investigation to criminal prosecution.¹⁶ It is then—and only then—that the state has “crossed the constitutionally-significant divide from fact-finder to adversary,”¹⁷ whereby the defendant “finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.”¹⁸

For these reasons, the courts consistently reject arguments that any of the following should trigger the right to counsel:

Closely related crime: Although the suspect had not been charged with the crime under investigation, he *had* been charged with a crime that was closely related to it. See “The ‘Crime Specific’ Rule,” below.

Grounds to charge: There was sufficient evidence to charge the suspect.¹⁹

Ramey warrant issued: A pre-complaint (*Ramey*) warrant had been issued for his arrest.²⁰

Grounds to arrest: Officers had probable cause to arrest him.²¹

Suspect was represented: He had hired an attorney to represent him.²²

committed itself to prosecute”]; *Davis v. United States* (1994) 512 U.S. 452, 456 [“The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings”]; *Moran v. Burbine* (1986) 475 U.S. 412, 428 [“[T]he defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches.”]; *People v. Frye* (1998) 18 Cal.4th 894, 987 [“The Sixth Amendment right to counsel attaches at the time adversary judicial proceedings are initiated against the accused”].

¹⁵ (2006) 134 Cal.App.4th 1186, 1197.

¹⁶ See *Michigan v. Jackson* (1986) 475 U.S. 625, 632 [“[A]fter a formal accusation has been made . . . a person who had previously been just a ‘suspect’ has become an ‘accused’ within the meaning of the Sixth Amendment”]; *Moran v. Burbine* (1986) 475 U.S. 412, 430 [“By its very terms, it becomes applicable only when the government’s role shifts from investigation to accusation.”]; *Arizona v. Roberson* (1988) 486 U.S. 675, 685 [“[The Sixth Amendment right to counsel] arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him.”]; *People v. Duck Wong* (1976) 18 Cal.3d 178, 185 [Sixth Amendment does not apply “to the less critical investigatory phase of a criminal case.”]; *People v. Viray* (2006) 134 Cal.App.4th 1186, 1197 [“[B]y the time the prosecutor files a complaint, the government’s role has shifted from investigation to accusation.”]; *People v. Woods* (2004) 120 Cal.App.4th 929, 940.

¹⁷ *U.S. Ex. Rel. Hall v. Lane* (7th Cir. 1986) 804 F.2d 79, 82.

¹⁸ *Kirby v. Illinois* (1972) 406 U.S. 682, 689.

¹⁹ See *Hoffa v. United States* (1966) 385 U.S. 293, 310 [“Nothing in *Massiah*, in *Escobedo*, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine”; i.e., that a suspect’s Sixth Amendment right to counsel attaches when “the Government had sufficient ground for taking the [suspect] into custody and charging him”].

²⁰ See *People v. Case* (1980) 105 Cal.App.3d 826, 833-4; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1205; *U.S. v. Reynolds* (6th Cir. 1985) 762 F.2d 489, 493 [“The mere issuance of an unexecuted warrant indicating probable cause to arrest is certainly no more an adversary judicial proceeding than is actual arrest and custody.”]; *Judd v. Vose* (1st Cir. 1987) 813 F.2d 494, 497 [“[Defendant] had been arrested on a fugitive warrant and had waived extradition proceedings, but had not been formally charged.”]. ALSO SEE *People v. Case* (1980) 105 Cal.App.3d 826, 831-2 [court rejects argument that an arrest necessarily demonstrates an intent to initiate criminal proceedings]. **NOTE:** Although Pen. Code § 804 states that a prosecution is “commenced” when an “arrest warrant or bench warrant is issued,” this section applies only to speedy trial issues—not the Sixth Amendment. See *People v. Wheelock* (2004) 117 Cal.App.4th 561, 565, fn.5; *United States v. Gouveia* (1984) 467 U.S. 180, 190.

²¹ See *Hoffa v. United States* (1966) 385 U.S. 293, 310 [“There is no constitutional right to be arrested.”]; *People v. Webb* (1993) 6 Cal.4th 494, 527 [“[A]ny conscious delay in arresting defendant in this case did not violate defendant’s Sixth Amendment right to counsel.”].

Search warrant issued: A judge had issued a warrant to search his home.²³

Focus of the investigation: He had become the primary suspect or was otherwise the “focus” of the investigation.²⁴

Suspect invoked *Miranda*: He invoked his *Miranda* right to counsel.²⁵

In addition, a suspect who had been charged has no Sixth Amendment rights if the charge was later dismissed.²⁶

THE “CRIME SPECIFIC” RULE

If a suspect’s Sixth Amendment rights have attached, the only investigation affected is the one pertaining to the charged crime. Thus, the courts often say that the Sixth Amendment is “crime specific,”²⁷ meaning “it attaches only to the specific charges as to which adversary proceedings have been initiated.”²⁸ For example, if a suspect had been charged with robbery, the Sixth Amendment would not restrict questioning about an uncharged and unrelated murder.

But what if the robbery and murder *were* related? In the past, this might have caused problems because some courts were ruling that suspects had Sixth Amendment rights as to uncharged crimes that were “closely related” to a charged crime. The case of *People v. Boyd*²⁹ is an example. There, the defendant burglarized a storeroom in San Francisco then set it on fire to cover up the crime. He was initially charged only with burglary, and an attorney was appointed to represent him. Later, when officers sought to question him about the uncharged arson, he waived his *Miranda* rights and confessed. But the court

²² See *Moran v. Burbine* (1986) 475 U.S. 412, 430 [“[T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel.”]; *People v. Ledesma* (1988) 204 Cal.App.3d 682, 695 [Sixth Amendment not triggered merely because “he had an appointment to see an attorney the afternoon of his arrest, and had planned to confer with him and then surrender himself”]; *People v. Duck Wong* (1976) 18 Cal.3d 178, 184-5; *People v. Mack* (1979) 89 Cal.App.3d 974, 978 [“[K]nowledge by the officers that a defendant has an attorney *before* formal charges are filed is immaterial”]; *U.S. v. Hayes* (9th Cir. (2000) 231 F.3d 663, 674 [“[T]he appointment of counsel does not, and indisputably cannot, formally initiate criminal proceedings against anyone.”].

²³ See *People v. Woods* (2004) 120 Cal.App.4th 929, 941.

²⁴ See *People v. Clair* (1992) 2 Cal.4th 629, 657 [“It is not enough that the defendant has become the focus of the underlying criminal investigation.”]; *People v. Hovey* (1988) 44 Cal.3d 543, 561; *People v. Riskin* (2006) 143 Cal.App.4th 234, 243; *U.S. v. Hayes* (9th Cir. 2000) 231 F.3d 663 [Sixth Amendment did not apply when the suspect was the uncharged “target” of federal investigation even though counsel had been appointed to represent him].

²⁵ See *People v. Acuna* (1988) 204 Cal.App.3d 602, 607; *People v. Lucero* (1987) 190 Cal.App.3d 1065, 1067.

²⁶ See *U.S. v. Montgomery* (4th Cir. 2001) 262 F.3d 233, 246 [“When an indictment is dismissed (or *nol prossed*) and a defendant discharged, the respective positions of the government and defendant undergo a most important change—they cease to be adversarial.”]; *U.S. v. Mapp* (2nd Cir. 1999) 170 F.3d 328, 334. **ALSO SEE** *U.S. v. Martinez* (9th Cir. 1992) 972 F.2d 1100, 1105-6 [right to counsel may not terminate when the dismissal of state charge and immediate filing of federal charge resulted from “collusion between the authorities”].

²⁷ See *Texas v. Cobb* (2001) 532 U.S. 162, 165; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 [“The Sixth Amendment right, however, is offense specific.”]; *Maine v. Moulton* (1985) 474 U.S. 159, 180 [“[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public’s interest in the investigation of criminal activities.”].

²⁸ *U.S. v. Yousef* (2nd Cir. 2003) 327 F.3d 56, 140, fn.65.

²⁹ (1978) 86 Cal.App.3d 54.

ruled the confession was obtained in violation of the Sixth Amendment because the arson and burglary were “closely related.”

Although the United States Supreme Court clearly rejected this type of reasoning in 1991,³⁰ some courts needed a reminder. They got it in 2001 when the Court announced its decision in *Texas v. Cobb*.³¹ Here is what happened.

While burglarizing a home in Texas, Cobb was confronted by the woman who lived there. He murdered her and her 16-month old baby, then buried their bodies in a nearby wooded area. Before the bodies were found, he confessed to the burglary but claimed he didn't know what had happened to the woman and her baby. After an attorney was appointed to represent him on the burglary, investigators questioned him about the disappearance of the victims, and he eventually confessed to having killed them.

The Texas courts concluded that the confession was inadmissible under the Sixth Amendment because the charged burglary and uncharged murders were “very closely related factually.” The Supreme Court reversed, pointedly saying it “meant what it said” in 1991—that a defendant does not acquire a Sixth Amendment right to counsel as to an uncharged crime merely because it was closely related to, or even inextricably intertwined with, a charged crime.

Here are two more examples of how this rule works and why it is important. In *People v. Michael B.*³² the defendant was charged with one residential burglary, and an attorney was appointed to represent him. Because he was also a suspect in two uncharged residential burglaries, an officer met with him and, after obtaining a *Miranda* waiver, questioned him about those crimes. He confessed. Although the court acknowledged that all three burglaries were “close in time, same modus operandi, same general locale,” it ruled the confession was admissible because the defendant simply had no Sixth Amendment rights as to the two uncharged burglaries.

Similarly, in *People v. Robert E.*³³ the defendant committed perjury while testifying at his juvenile court hearing on charges of vandalism and felony assault. After the court sustained the allegations, an officer met with him at a detention facility and, after obtaining a *Miranda* waiver, questioned him about the truthfulness of his testimony. As a result, a perjury petition was subsequently filed, and his statements to the officer were used against him. On appeal, he argued that attachment of his Sixth Amendment rights as to the assault and vandalism charges should also cover the perjury charge because the crimes were “based on the same set of facts.” The court disagreed, noting that the perjury “occurred *after* Robert was accused of the underlying charges and was not part of the same conduct.”

³⁰ See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175. ALSO SEE *People v. Clair* (1992) 2 Cal.4th 629, 657 [“[The Sixth Amendment] attaches to offenses as to which adversarial criminal proceedings have been initiated—and to such offenses alone.”]; *People v. Plyler* (1993) 18 Cal.App.4th 535, 547 [“The ‘closely related’ doctrine has been thoroughly undermined by the ‘offense-specific’ doctrine enunciated by the United States Supreme Court.”].

³¹ (2001) 532 U.S. 162. ALSO SEE *People v. Slayton* (2001) 26 Cal.4th 1076, 1081 [“[T]he United States Supreme Court’s decision in *Cobb* definitively rejected the [‘inextricably intertwined’ exception] the Court of Appeal majority applied in this case.”].

³² (1981) 125 Cal.App.3d 790.

³³ (2000) 77 Cal.App.4th 557. ALSO SEE *People v. Martin* (2002) 98 Cal.App.4th 408, 414-23 [covert questioning of a charged murder defendant by a witness he had threatened to kill did not violate the defendant’s Sixth Amendment rights because officers were investigating the uncharged crime of intimidating a witness]

DOUBLE JEOPARDY EXCEPTION: There is one limited exception to the rule that Sixth Amendment protections cover only charged crimes. The Court in *Cobb* ruled that a suspect who has been charged with a crime will have Sixth Amendment rights as to an uncharged crime if, by committing the charged crime, he also committed the uncharged crime and, thus, under the double jeopardy rule, he could not be prosecuted for both crimes.³⁴ This did not affect the result in *Cobb* because, as the Court pointed out, burglary and murder “are not the same offense.”

Shortly after *Cobb* was decided, the California Supreme Court applied the double jeopardy exception in the case of *People v. Slayton*.³⁵ Here, the defendant burglarized a house in San Bernardino County and stole the residents’ car. He then drove to Riverside County where he was arrested and charged with car theft (Veh. Code § 10851). He was arraigned on that charge and an attorney was appointed to represent him. Three days later, a San Bernardino officer interrogated him at the jail and obtained a confession to the burglary, as well as the car theft.

On appeal, the court ruled that the questioning about the car theft violated Slayton’s Sixth Amendment right to counsel because the car theft that occurred in San Bernardino County was, for double jeopardy purposes, the same as the one in Riverside County. This is because a person who steals a car in County A does not commit a new crime when he drives into County B. But the court also ruled that the questioning about the San Bernardino burglary was lawful because “that offense unquestionably was not the same as any of the offenses charged in Riverside County.”³⁶

COMPARE MIRANDA: In contrast to the Sixth Amendment, the *Miranda* right to counsel is *not* crime-specific. This means that if a suspect invokes his *Miranda* right to counsel during custodial interrogation, officers may not later initiate questioning about *any* crime—charged or uncharged—so long as he remains in custody.³⁷

³⁴ See *Texas v. Cobb* (2001) 532 U.S. 162, 173 [“[W]e hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.”]; *Blockburger v. United States* (1932) 284 U.S. 299, 304 [“[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”].

³⁵ (2001) 26 Cal.4th 1076.

³⁶ **NOTE: Federal-State Prosecutions:** There are two views on whether the filing of state charges results in attachment as to comparable federal charges, and vice versa. See *U.S. v. Mills* (2nd Cir. 2005) 412 F.3d 325, 330 [“Where, as here, the same conduct supports a federal or a state prosecution, a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel and then to share the information with the other sovereign without fear of suppression. We easily conclude that *Cobb* was intended to prevent such a result.”]. COMPARE *U.S. v. Avants* (5th Cir. 2002) 278 F.3d 510, 518 [“[T]he federal and state murder prosecutions against Avants are not the ‘same offense’ under the Sixth Amendment because each was initiated by a separate sovereign.”]; *U.S. v. Coker* (1st Cir. 2005) 433 F.3d 39, 44 [“[W]e conclude that the dual sovereignty doctrine applies for the purposes of defining what constitutes the same offense in the Sixth Amendment right to counsel context.”]; *U.S. v. Reyes* (D. Mass. 2006) 434 F.Supp.2d 58, 65 [“The dual sovereignty doctrine means that a defendant’s conduct in violation of two separate sovereigns constitutes two distinct offenses.”].

³⁷ See *Arizona v. Roberson* (1988) 486 U.S. 675; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 [“Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present.”]. **NOTE:** *Roberson* was based on the questionable theory that suspects who do not feel “comfortable” talking with officers about a certain crime without having an attorney present will necessarily feel uncomfortable talking about any other crimes for which they are suspected. At p. 684.

Earlier, we noted that the Sixth Amendment affects only “critical” confrontations between defendants and officers or prosecutors. What types of confrontations are deemed “critical?” And how does the Sixth Amendment affect them? Those are the questions we will address in the remainder of this article.

POLICE-INITIATED QUESTIONING

Although most suspects are questioned before they have been charged, it is sometimes necessary or desirable to do so afterward. This might occur, for example, if the suspect was arrested on a complaint warrant, or if officers needed to clarify something he said before he was charged, or if they wanted to confront him with newly-discovered evidence.

While police-initiated questioning certainly qualifies as a “critical” confrontation after the suspect has been charged, the United States Supreme Court has ruled it does not violate the Sixth Amendment if both of the following circumstances existed:

(1) **No invocation:** The suspect had not previously invoked his Sixth Amendment rights.³⁸

(2) **Waiver:** He waived his Sixth Amendment rights before the questioning began.

These two limitations will probably sound familiar because they are also the foundation of the *Miranda* procedure. In fact, as we will discuss later, a *Miranda* waiver also constitutes a Sixth Amendment waiver. The main difference is in what actions constitute an invocation.

Sixth Amendment invocations

Unlike *Miranda* invocations which occur when suspects say they want the assistance of counsel before or during questioning by officers,³⁹ Sixth Amendment invocations occur when suspects say they want the assistance of counsel in dealing with judges or prosecutors in courtrooms. Such a wish can be expressed in two ways:

³⁸ See *Maine v. Moulton* (1985) 474 U.S. 159, 170 [“Once the right to counsel has attached *and been asserted*, the State must of course honor it.” Emphasis added]; *Michigan v. Harvey* (1990) 494 U.S. 344, 349 [[A]fter a defendant requests counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid”]; *Michigan v. Jackson* (1986) 475 U.S. 625, 636; *Patterson v. Illinois* (1988) 487 U.S. 285, 290-1 [“The fact that petitioner’s Sixth Amendment right came into existence with his indictment, i.e., that he had such a right at the time of his questioning, does not distinguish him from the preindictment interogatee whose right to counsel is in existence and available for his exercise while he is questioned.”]; *U.S. v. Yousef* (2nd Cir. 2003) 327 F.3d 56, 140-1 [“[I]t is the defendant’s invocation of his right to counsel that vitiates the validity of a waiver”]; *U.S. v. Spruill* (7th Cir. 2002) 296 F.3d 580, 585 [“[T]he government may not initiate questioning of the suspect absent the presence of counsel if that suspect has previously asserted his right to counsel.”]; *Wilcher v. Hargett* (5th Cir. 1992) 978 F.2d 872, 876 [“[A] defendant’s Sixth Amendment rights are not violated by questioning in the absence of an attorney unless the defendant has asserted his right to an attorney.”]; *U.S. v. Harrison* (9th Cir. 2000) 213 F.3d 1206, 1209 [“Attachment and invocation are distinct legal events.”]; *Chewning v. Rogerson* (8th Cir. 1994) 29 F.3d 418, 420 [“The right is not self-executing but must be invoked by the person claiming it.”].

³⁹ See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178; *Davis v. United States* (1994) 512 U.S. 452, 459. **NOTE:** An invocation of the *Miranda* right to counsel occurs only if the suspect makes “some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.” See *Davis v. United States* (1994) 512 U.S. 452, 459; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 [“The purpose of the *Miranda-Edwards* guarantee, on the other hand—and hence the purpose of invoking it—is to protect a quite different interest: the suspect’s desire to deal with the police only through counsel.”]; *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324.

- (1) **Defendant retains counsel:** A defendant invokes his Sixth Amendment rights if he retains counsel to represent him on the charged case.⁴⁰
- (2) **Defendant requests counsel:** An invocation also occurs if the defendant requested or accepted a court-appointed attorney.⁴¹ This usually happens at arraignment when the judge appoints the public defender or refers him to the public defender's office for an interview.⁴²

The following issues may arise in determining whether an invocation has occurred:

OFFICERS UNAWARE OF INVOCATION: In many cases, officers who seek to question a charged suspect will not know that he had previously retained or requested counsel. It doesn't matter. As far as the law is concerned, officers are deemed to have actual knowledge of the suspect's previous Sixth Amendment (or *Miranda*) invocations. In the words of the United States Supreme Court, "One set of state actors (the police) may not claim ignorance of defendant's unequivocal request for counsel to another state actor (the court)."⁴³

DEFENDANT HAS AN ATTORNEY IN ANOTHER CASE: A defendant does not invoke his Sixth Amendment right to counsel by retaining an attorney to represent him in another matter.⁴⁴ (In such cases, officers are not required to obtain the attorney's permission to question his client; nor are they required to notify him that they plan to do so.⁴⁵)

⁴⁰ See *Brewer v. Williams* (1977) 430 U.S. 387, 405 ["Williams had effectively asserted his right to counsel by having secured attorneys"]; *People v. Hayes* (1988) 200 Cal.App.3d 400, 407 ["[W]here a defendant is represented by an attorney he is entitled to no less Sixth Amendment protection than a defendant who simply requested an attorney."].

⁴¹ See *People v. Frye* (1998) 18 Cal.4th 894, 987 ["[T]here is nothing in the record to indicate defendant requested the assistance of counsel prior to speaking to police"]; *U.S. v. Harrison* (9th Cir. 2000) 213 F.3d 1206, 1209 ["But attachment of the right alone does not guarantee a defendant the assistance of counsel. A defendant must also invoke the Sixth Amendment right by hiring a lawyer or asking for appointed counsel."].

⁴² *McNeil v. Wisconsin* (1991) 501 U.S. 171, 180-1 ["[I]n most States, at least with respect to serious offenses, free counsel is made available at [arraignment] and ordinarily requested."].

⁴³ *Michigan v. Jackson* (1986) 475 U.S. 625, 634. ALSO SEE *People v. Hayes* (1988) 200 Cal.App.3d 400, 407-8 ["[L]aw enforcement officers will be assumed to know that a defendant is represented by counsel in a case to the same extent as the court is aware that the accused is represented. 'Studied ignorance' generated by a failure to inquire will not be treated as equivalent as innocent or blameless conduct by law enforcement officials."].

⁴⁴ See *People v. Carter* (2003) 30 Cal.4th 1166, 1210 ["[Although] counsel had already been appointed to represent him in his capital case, [the officer] did not question him about the capital case but rather about the as yet uncharged assault."]; *People v. Webb* (1993) 6 Cal.4th 494, 527 ["No contrary conclusion is compelled by the fact that defendant had already been charged, incarcerated, and appointed counsel on wholly unrelated offenses."]; *People v. Duck Wong* (1976) 18 Cal.3d 178; *People v. Wader* (1993) 5 Cal.4th 610, 636 ["Although defendant had obtained counsel in a case that was unrelated to this case, because defendant's Sixth Amendment right to counsel in this case had not attached it could not be violated."]; *People v. Sully* (1991) 53 Cal.3d 1195, 1233-4; *People v. Mattson* (1990) 50 Cal.3d 826, 867-9, fn.25; *People v. Mack* (1979) 89 Cal.App.3d 974, 977; *People v. Booker* (1977) 69 Cal.App.3d 654, 664 ["[A]lthough counsel had been appointed on the New Mexico charges, the interrogations investigating the California crimes were permissible."]; *People v. Ledesma* (1988) 204 Cal.App.3d 682, 693; *People v. Morris* (1991) 53 Cal.3d 152, 202; *People v. Duren* (1973) 9 Cal.3d 218, 243 ["[T]he fact that counsel had been appointed to represent defendant on a completely unrelated charge did not make ineffective his clear waiver of counsel."]; *People v. Michael B.* (1981) 125 Cal.App.3d 790, 794 ["[B]efore charges are filed, questioning out of the presence of an attorney who already represents the defendant is not absolutely barred, but rather is permitted, provided the Fifth Amendment waiver is valid."]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1283; *People v. Walker* (1983) 145 Cal.App.3d 886, 895.

⁴⁵ See *People v. Duck Wong* (1976) 18 Cal.3d 178; *People v. Carter* (2003) 30 Cal.4th 1166, 1210 ["We do not understand the high court to have mandated that counsel previously appointed or retained in an unrelated

DEFENDANT HAS ATTORNEY FOR NON-TRIAL MATTER: An invocation does not result merely because counsel was retained or appointed for an ancillary proceeding, such as deportation, extradition,⁴⁶ or a post-charging lineup.⁴⁷

AMBIGUOUS REQUESTS FOR ATTORNEY: There is reason to believe that a request for counsel will constitute a Sixth Amendment invocation only if it was clear and unambiguous.⁴⁸

“ONGOING” REPRESENTATION: As a general rule, a suspect can invoke his Sixth Amendment right to counsel only *after* he has been charged.⁴⁹ In one case, however, the Ninth Circuit ruled that a suspect automatically invoked at the moment he was charged when all of the following occurred: (1) he retained counsel to represent him “on an ongoing basis” in the event he was charged; (2) officers knew, or should have known, he had done so; and (3) the suspect was subsequently charged with the crime that was “precisely anticipated” when he retained counsel.⁵⁰

case be notified whenever jail authorities seek to question an inmate about possible criminal acts committed while in custody.”]; *People v. Mattson* (1990) 50 Cal.3d 826, 869 [no Sixth Amendment violation occurs “as a result of a failure to notify counsel who represents defendant in a prosecution for a separate offence”]; *U.S. v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1338 [court notes that if officers were required to notify counsel, “[t]hose engaged in ongoing criminal activity would be encouraged to obtain ‘house counsel’”].

⁴⁶ See *People v. Wheelock* (2004) 117 Cal.App.4th 561, 569 [“The commencement of extradition proceedings is not enough, by itself, for the Sixth Amendment right to counsel to attach.”]; *DeSilva v. DiLeonardi* (7th Cir. 1999) 181 F.3d 865, 868 [“Extradition is not a ‘criminal prosecution.’”]; *Chewning v. Rogerson* (8th Cir. 1994) 29 F.3d 418, 421 [“It is well settled that extradition proceedings are not considered criminal proceedings that carry the sixth amendment guarantee of assistance of counsel.”]; *Judd v. Vose* (1st Cir. 1987) 813 F.2d 494, 497 [“[A]n extradition proceeding has a modest function not involving the question of guilt or innocence, and is not a ‘criminal proceeding’ within the meaning of the sixth amendment.”]; *U.S. v. Yousef* (2nd Cir. 2003) 327 F.3d 56, 143 [“[T]here simply is no Sixth Amendment right to counsel . . . in connection with deportation proceedings, which are civil in nature.”].

⁴⁷ See *People v. Mattson* (1990) 50 Cal.3d 826, 867-8, fn.25.

⁴⁸ **NOTE:** In his concurring opinion in *Texas v. Cobb* (2001) 532 U.S. 162, 176, Justice Kennedy, joined by Justices Scalia and Thomas, said that the rule prohibiting post-invocation questioning “should apply only where the suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel” This is consistent with the rule that *Miranda* invocations must be clear and unambiguous. See *Davis v. United States* (1994) 512 U.S. 452, 459 [“Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.”]; *People v. Stitely* (2005) 35 Cal.4th 514, 535 [“In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect must *unambiguously* assert his right to silence or counsel.”]; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125 [the test is “whether, in light of the circumstances, a reasonable officer would have understood a defendant’s reference to an attorney to be an unequivocal and unambiguous request for counsel”]. ALSO SEE *U.S. v. Spruill* (7th Cir. 2002) 296 F.3d 580, 587 [“[T]he appointment of an attorney, without some positive affirmation of acceptance or request of the assistance of counsel on the part of the defendant, does not constitute an assertion of one’s Sixth Amendment right to counsel.”]; *Wilcher v. Hargett* (5th Cir. 1992) 978 F.2d 872; *Montoya v. Collins* (5th Cir. 1992) 955 F.2d 279, 283.

⁴⁹ See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 176 [“[P]etitioner provided the statements at issue here before his Sixth Amendment right to counsel . . . had been (or even could have been) invoked”]; *U.S. v. Harrison* (9th Cir. 2000) 213 F.3d 1206, 1210 [“[I]t appears that, as a general rule, attachment must precede invocation in time.”].

⁵⁰ *U.S. v. Harrison* (9th Cir. 2000) 213 F.3d 1206, 1213. COMPARE *People v. Wheelock* (2004) 117 Cal.App.4th 561, 568, fn.7 [appointment of extradition attorney does not constitute “ongoing” representation for purposes of invoking *Harrison*].

Sixth Amendment waivers

If a defendant has not invoked his Sixth Amendment rights, officers may question him about the charged crime if he waives his rights.⁵¹ As the court explained in *People v. Henderson*, “When a complaint has been filed and an arrest has been made and the accused is not represented by counsel, there is no absolute prohibition against the police eliciting a statement from the accused so long as the waiver of the right to have counsel present is free and voluntary.”⁵²

HOW TO OBTAIN A WAIVER: There are two ways to obtain a Sixth Amendment waiver. The simplest is to obtain a *Miranda* waiver. This is because the United States Supreme Court ruled in *Patterson v. Illinois* that, in the context of police interrogation, a *Miranda* waiver also constitutes a waiver of the Sixth Amendment right to counsel. Said the Court:

By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, [the officer] conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him.⁵³

In most cases, officers will utilize a *Miranda* waiver to obtain a Sixth Amendment waiver because most charged suspects who are questioned are in custody for *Miranda* purposes and, therefore, officers will be required to obtain a *Miranda* waiver.

If the defendant is out of custody, officers can seek a limited Sixth Amendment waiver⁵⁴ or a *Miranda* waiver. (This is probably the only situation in which officers will seek a *Miranda* waiver from a suspect who is not in custody.)

IF DEFENDANT DOESN'T KNOW HE'S UNDER ARREST: In one case, the Court of Appeal ruled that a Sixth Amendment waiver was not knowing and intelligent (and was therefore invalid) because, (1) the officers did not tell him he had been charged, and (2) they neglected to tell him he was under arrest.⁵⁵ To avoid this issue, officers who choose not to inform an arrested suspect that charges have been filed should at least make sure he knows he is under arrest.

⁵¹ See *Michigan v. Harvey* (1990) 494 U.S. 344, 348-9 [“[T]he State must prove a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel.”]; *People v. Frye* (1998) 18 Cal.4th 894, 987 [“For a waiver to be valid, it must be a voluntary, knowing and intelligent relinquishment of the right to counsel.”]; *People v. Acuna* (1988) 204 Cal.App.3d 602, 609 [“The right to counsel cannot be forced upon a defendant, who after advisement at a critical stage must elect whether to exercise that right and request the assistance of counsel.”]; *U.S. v. Yousef* (2nd Cir. 2003) 327 F.3d 56, 140 [“[A]ttachment of the Sixth Amendment right to counsel, by itself, does not preclude a defendant from validly waiving his right to counsel.”]; *U.S. v. Spruill* (7th Cir. 2002) 296 F.3d 580, 585 [“The Sixth Amendment is not violated when an accused is interrogated without the presence of counsel, even after that right has attached, if the accused executes a voluntary, knowing and intelligent waiver.”]; *Chewning v. Rogerson* (8th Cir. 1994) 29 F.3d 418, 422 [“If the person has not invoked [the Sixth Amendment right to counsel], a waiver of the right may be made during police-initiated interrogation”].

⁵² (1990) 225 Cal.App.3d 1129, 1160.

⁵³ (1988) 487 U.S. 285, 298. ALSO SEE *Michigan v. Harvey* (1990) 494 U.S. 344, 349 [“[W]hen a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda v. Arizona*, that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of postindictment questioning.”]; *People v. Frye* (1998) 18 Cal.4th 894, 987 [“When an accused relinquishes the right to counsel after having received *Miranda* warnings, that will generally establish a knowing and intelligent waiver [of Sixth Amendment rights].”]; *People v. Sully* (1991) 53 Cal.3d 1195, 1234.

⁵⁴ **NOTE:** A limited Sixth Amendment waiver is simply a *Miranda* waiver without the Fifth Amendment warning that the suspect has a right to remain silent. See *Patterson v. Illinois* (1988) 487 U.S. 285, 293-4.

⁵⁵ *People v. Engert* (1987) 193 Cal.App.3d 1518, 1526.

“ELICITING” STATEMENTS

In addition to restricting direct forms of questioning, the Sixth Amendment prohibits officers and prosecutors from utilizing more subtle methods of inducing defendants to make incriminating statements. Specifically, they cannot “deliberately elicit” an incriminating statement, or even stimulate a conversation about the charged crime.⁵⁶

For example, in the famous “Christian Burial Speech” case, *Brewer v. Williams*,⁵⁷ the defendant surrendered to police in Davenport, Iowa after he had been charged with abducting a 10-year old girl in Des Moines. Officers believed that Williams had killed the girl, but her body had not been found. So, while driving him back to Des Moines, a police detective said to him:

I want to give you something to think about while we’re traveling down the road. Number one, I want you to observe the weather conditions. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is . . . and if you get a snow on top of it you yourself may be unable to find it. . . . I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered.

Williams then told him where he had left the girl’s body. But the United States Supreme Court ruled the statement was obtained in violation of the Sixth Amendment because, although the detective had not technically questioned Williams, his remarks were reasonably likely to elicit an incriminating response; i.e., the location of the body. Said the Court, “There can be no serious doubt [that the detective] deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him.”

As we discuss later, the courts also employ the “deliberately eliciting” test when the person trying to obtain information is an undercover police agent.

SUSPECT-INITIATED QUESTIONING

A defendant will sometimes contact investigators directly or through jail staff and say he is willing to talk with them about a charged crime. When this happens, they may question him if he waives his *Miranda* rights which, as noted, also constitutes a waiver of his Sixth Amendment rights.⁵⁸

IF THE DEFENDANT PREVIOUSLY INVOKED: Officers may question the defendant even though he had previously invoked his Sixth Amendment rights. As the United States Supreme Court observed, “To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be to imprison a man in his privileges and call it the Constitution.”⁵⁹

⁵⁶ See *Fellers v. United States* (2004) 540 U.S. 519, 524 [“We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard.” Citations omitted.].

⁵⁷ (1977) 430 U.S. 387. **NOTE:** The Court in *Brewer* did not address the applicability of the “crime-specific” rule. See the discussion of this issue in the non-published case of *People v. Keller* (2001) 104 Cal.Rptr.2d 259.

⁵⁸ See *Patterson v. Illinois* (1988) 487 U.S. 285, 291 [“If an accused knowingly and intelligently [initiates questioning and waives the right to counsel] we see no reason why the uncounseled statements he then makes must be excluded at his trial.”].

⁵⁹ *Michigan v. Harvey* (1990) 494 U.S. 344, 353.

For example, in *People v. Dickson*⁶⁰ the defendant was arrested by Fresno police for robbing and murdering the owner of a restaurant; and robbing, kidnapping, and raping a clerk at a 7-Eleven store. He was charged with both crimes and a public defender was appointed to represent him. Later, Dickson notified the investigating officer that he wanted to talk to him. The officer informed the public defender who said he would not permit the officer to meet with Dickson. But when Dickson sent another message, the officer brought him to the police station and, after determining that he wanted to talk about his case, obtained a waiver—and a confession to the 7-Eleven robbery.

In arguing that the confession should have been suppressed, Dickson noted that he had been charged with the 7-Eleven robbery and that he had invoked his Sixth Amendment rights by accepting court-appointed counsel. True enough, said the court, but because he had voluntarily initiated the questioning, there was no Sixth Amendment violation. As the court pointed out:

[N]o authority is cited for the crucial proposition that a defendant's repeated, independently motivated requests for an opportunity to speak to police investigators must be ignored because the defendant has counsel even when the defendant knows that his counsel is opposed to his speaking to the officers and chooses to ignore counsel's advice.

Note that in situations such as this, officers are not required to notify the defendant's attorney before questioning. For example, in *People v. Sultana*⁶¹ the defendant had been charged with murder in Santa Cruz and had hired an attorney. After he was held to answer, he notified the investigating officer that he wanted to meet with him. Sultana began the meeting by saying he was no longer represented by counsel because he had "run out of money." And although he was still technically represented (certainly as far as the law was concerned), he wanted to talk about his case. The officer then obtained a *Miranda* waiver and proceeded with the interview, which produced some incriminating statements.

On appeal, Sultana argued that his statements should have been suppressed because, at the very least, the officer should have been required to notify his attorney before talking to him. The court disagreed, saying:

The State is not required under [United States Supreme Court precedent] to contact a defendant's attorney of record prior to questioning where the defendant has initiated interrogation and waived his right to counsel following *Miranda* warnings.

DEFENDANT INITIATES A TALK WITH KNOWN AGENT: A defendant will be deemed to have waived his Sixth Amendment rights if he initiates a conversation about a charged crime with a civilian who he knows is a police agent or is otherwise assisting officers. As the United States Supreme Court explained, "An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then 'arms' length' adversaries."⁶²

⁶⁰ (1985) 167 Cal.App.3d 1047.

⁶¹ (1988) 204 Cal.App.3d 511. ALSO SEE *People v. Stephens* (1990) 218 Cal.App.3d 575, 585 ["While the defendant should have the opportunity to consult his counsel, it cannot be said that the attorney must have the right to consult with his client."].

⁶² *United States v. Henry* (1980) 447 U.S. 264, 273. ALSO SEE *People v. Wojtkowski* (1985) 167 Cal.App.3d 1077, 1082 ["*Massiah* and its progeny rest upon the premise that an accused speaking with a known

For example, in *Jenkins v. Leonardo*⁶³ the defendant, after being charged with rape, made several phone calls to his victim. She notified police who asked her to try to get him to talk about the crime if he should call again. They also furnished her with a device to record his calls. Jenkins did call again, and he made some incriminating statements which were used against him. On appeal, the court rejected the argument that his statements should have been suppressed, pointing out that the Sixth Amendment does not prohibit questioning when a charged and represented suspect initiates a conversation with “someone he knew or should have known was a state agent.”

QUESTIONING BY POLICE AGENTS

The Sixth Amendment also covers operations in which officers utilize a civilian to initiate a conversation with suspect about a crime with which he has been charged. In such cases, a resulting statement will be suppressed if, (1) the civilian was a “police agent,” and (2) he “deliberately elicited” it.⁶⁴

Who are “police agents”

In the context of covert questioning, there are two types of police agents: (1) people who seek incriminating information at the direct request of officers,⁶⁵ and (2) those who do so under an implied agreement. The people who fall into the first category are usually informants, but sometimes victims, accomplices, or undercover officers.

For example, in *In re Neely*⁶⁶ the defendant was arrested and charged with robbing and murdering a realtor in Cameron Park. An accomplice named Centers was also arrested. Centers, who had previously worked as an informant, admitted his involvement in the crime but claimed that Neely was the shooter. So officers asked him to find out

government agent is aware that his statements may be used against him because the parties are arm's length adversaries. The relationship between defendant and his victim, as prosecuting witness against him, is similarly adversarial.”].

⁶³ (2nd Cir. 1993) 991 F.3d 1033. ALSO SEE *In re Neely* (1993) 6 Cal.4th 901, 918-9 [*Jenkins* applies only if the defendant was aware he was speaking with someone who “was acting in cooperation with law enforcement authorities.”].

⁶⁴ See *Massiah v. United States* (1964) 377 U.S. 201; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1442 [“[W]hen a government agent, including an informant acting at the state's request, deliberately elicits incriminating statements from a represented defendant, this action impairs the defendant's Sixth Amendment right to counsel”]; *People v. Coffman* (2004) 34 Cal.4th 1, 67. **NOTE:** Technically, such conduct would not violate the Sixth Amendment if the suspect had not invoked his Sixth Amendment rights and had waived them. But because it is impractical for undercover officers and agents to obtain waivers, the rule effectively prohibits any deliberate elicitation. See *United States v. Henry* (1980) 447 U.S. 264, 273 [“[T]he concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government.”]; *People v. Martin* (2002) 98 Cal.App.4th 408, 419 [“Thus, defendant did not waive his Sixth Amendment rights by talking with Ms. Camolina if she was acting for the government.”].

⁶⁵ See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 439 [“[The informant] had entered into an arrangement with Detective Cullen, according to which [the informant] agreed to listen to respondent's conversations and report his remarks to Cullen.”]; *In re Neely* (1993) 6 Cal.4th 901, 915 [informant may be a police agent as the result of police “encouragement, or guidance”]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247 [“Specific direction from government agents . . . can establish an implicit agreement.”]; *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1358 [“[T]he relevant question is whether the FBI told [the informant] to collect information”]. COMPARE *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [“[N]o one ever made [the informant] any promise of benefit or leniency in return for his testimony.”]; *People v. Martin* (2002) 98 Cal.App.4th 408, 420 [no evidence of “preexisting agreement”].

⁶⁶ (1993) 6 Cal.4th 901.

from Neely what he had done with the murder weapon. He succeeded, but the court ruled that Centers appeared to have been a police agent. Thus, it concluded that Neely's attorney had provided ineffective assistance in failing to seek suppression on Sixth Amendment grounds.

In contrast, in *People v. Williams*⁶⁷ a man named Arthur Cox, who was an inmate at the Los Angeles County Jail, asked to meet with an officer to “cut a deal for information.” At the first meeting, the officer said he could not promise anything, and that he would have to talk to the prosecutor. He also told Cox that he was “not his agent” and that there was “no deal” yet. About a week later, the officer and a deputy DA met with Cox, who began by giving them a sample of the information he could provide: an inmate named Williams (the defendant) had made some statements about the murder for which he had been indicted. The prosecutor told Cox that he would have to talk to his supervisors about working out a deal, saying, “I’ll get back to you.” Cox later phoned the officer and provided him with additional incriminating information he had gotten from Williams. This information was used against Williams at trial, and he was convicted. In ruling that Cox was not a police agent, the California Supreme Court noted, “All of the prosecution witnesses who testified on the suppression motion stated they in no way asked or even suggested that Cox should be their agent.”

Similarly, in *People v. Moore*⁶⁸ the defendant, who was charged with shooting a police officer, was placed in a jail cell with a prisoner named White. Because Moore was considered a suicide risk, an officer asked White to “babysit” him. During a conversation in the cell, White asked Moore why he was in jail, and Moore responded that he had “shot a cop.” While White might have been a police agent for “babysitting” purposes, the court said there was no evidence that he “was acting pursuant to instructions from the police to deliberately elicit incriminating information.”

The other category of “police agent” consists of people—almost always informants—who are working under an *implied* agreement to seek incriminating information. How can the courts determine whether a tacit agreement existed? By necessity, they must rely on circumstantial evidence, such as the following.

OFFICERS PROVIDED AN INCENTIVE: An agreement will usually be implied if officers had given the informant an incentive to obtain incriminating information from the defendant.⁶⁹ Such an incentive typically consists of money,⁷⁰ leniency,⁷¹ or some special treatment.⁷²

⁶⁷ (1997) 16 Cal.4th 153.

⁶⁸ (1985) 166 Cal.App.3d 540.

⁶⁹ See *In re Neely* (1993) 6 Cal.4th 901, 915 [informant may be a police agent as the result of police “promises”]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241 [an informant will be a police agent if officers gave him “direct motivation” to provide information].

⁷⁰ See *United States v. Henry* (1980) 447 U.S. 264, 271 [“Nichols had been a paid Government informant for more than a year . . . The arrangement between Nichols and the agent was on a contingent-fee basis”].

⁷¹ See *In re Neely* (1993) 6 Cal.4th 901, 917-8 [informant was given “a promise (implied if not express) of some form of leniency”]; *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1358 [“[The FBI agent] conceded that there was an informal agreement with [the informant] to assist his parole application by detailing the extent of his cooperation with the government.”]. COMPARE *People v. Whitt* (1984) 36 Cal.3d 724, 744 [“Certainly, the police did nothing to indicate to [the informant] that his reports would in fact convince the prosecutor to be lenient.”].

⁷² **NOTE: The reward “requirement”:** The California Supreme Court has said that an informant will not be deemed a police agent unless he was acting “in accordance with a preexisting agreement and *with the expectation of receiving a benefit or advantage*. *In re Neely* (1993) 6 Cal.4th 901, 915. Emphasis added. Also

For example, in *People v. Whitt*⁷³ the defendant's cellmate notified an officer that Whitt had been talking about the murder with which he had been charged. The officer told him not to solicit further information from Whitt, and not to "mess" with him. But he also said that he "would contact the district attorney's office" about his case, and he slyly pointed out to him that if he happened to get any more incriminating information from Whitt "there was nothing that we could do, you know."

Although the court ruled that the informant was not a police agent, it added that the question was "a very close and difficult one." Said the court:

The detectives' offer to speak to the prosecutor on [the informant's] behalf raises a serious concern as to whether the state gave [the informant] an incentive to extract further statements from Whitt.

An implied agreement will not, however, result merely because the informant hoped or expected that he would receive some benefit.⁷⁴ For example, in *U.S. v. York*⁷⁵ the court pointed out that while a jailhouse informant "had some expectation that he would benefit" by seeking information from the defendant, there was "no evidence that the government had directed or steered the informant toward the defendant." The court added, "That inmates realize there is a market for information about crime does not make each inmate who enters the market a government agent." Consistent with this principle, the California Supreme Court ruled that a jail's policy of rewarding inmates for providing "useful" information did not automatically transform them into police agents.⁷⁶

OFFICERS TARGETED THE DEFENDANT: Another indication of a tacit agreement is that officers identified the defendant to the informant as a person who had information they wanted.⁷⁷ As the California Supreme Court observed in *In re Neely*:

see *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1357 ["[T]here is no agency absent the government's agreement to reward the informant for his services."]. There is, however, reason to believe that a reward of some sort may not be required. This was the conclusion of the court in *Schmitt v. True* (E.D. Va. 2005) 387 F.Supp.2d 622, 643 which provided a comprehensive analysis of the subject. In summarizing its conclusion, the court said, "Thus, it is clear from the controlling Supreme Court decisions—*Massiah*, *Henry*, and *Moulton*—that consideration or benefit is not the *sine qua non* of the informant's status as an agent of the State. Rather, agency is created by the agreement to act on behalf of the state and pursuant to its instructions." ALSO SEE *Randolph v. People of the State of California* (9th Cir. 2004) 380 F.3d 1133, 1144 ["[I]t is the relationship between the informant and the State, not the compensation the informant receives, that is the central and determinative issue."]. For example, it is likely that an informant who is acting at the request of officers would be deemed a police agent even if he did so because he thought it was his civic duty or because he did not like the defendant.

⁷³ (1984) 36 Cal.3d 724.

⁷⁴ See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1248 ["Of course, [the informant] may have hoped to receive some benefit in exchange for his ongoing receipt of information, but he nevertheless continued to act on his own initiative."]; *U.S. v. Watson* (D.C. Cir. 1990) 894 F.2d 1345, 1348 ["[The informant] was acting as an entrepreneur; he may have hoped to make a sale to the Government when he spoke with Watson, but that does not make the Government responsible for his actions."].

⁷⁵ (7th Cir. 1991) 933 F.2d 1343, 1356.

⁷⁶ *People v. Williams* (1988) 44 Cal.3d 1127, 1141. ALSO SEE *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240 ["a general policy of encouraging inmates to listen and report" does not establish an agency relationship].

⁷⁷ See *United States v. Henry* (1980) 447 U.S. 264, 271, fn.8 ["[The FBI agent] singled out Henry as the inmate in whom the agent had a special interest."]; *U.S. v. York* (7th Cir. 1991) 933 F.3d 1343, 1358 ["[The FBI agent] told [the informant] the type of information he was interested in receiving; that statement was tantamount to an invitation to [the informant] to go out and look for that type of information."]; *Schmitt v. True* (E.D. Va. 2005) 387 F.Supp.2d 622, 650 ["[The officer] had freighted his instructions to [the informant] with cues as to what information the police desired"]. COMPARE *U.S. v. Watson* (D.C. Cir. 1990) 894 F.2d

Circumstances probative of an agency relationship include the government's having directed the informant to focus upon a specific person, such as a cellmate, or having instructed the informant as to the specific type of information sought by the government.⁷⁸

PRIOR WORKING RELATIONSHIP: A person does not become a police agent merely because he had worked as a police informant in the past.⁷⁹ Still, it is a relevant circumstance, especially if he had received some benefit for providing incriminating information in the past.⁸⁰

INFORMANT LATER GOT A BREAK: The courts frequently note whether the informant, after obtaining the information from the defendant, was given money, a reduced sentence, or other consideration for his assistance. But such a circumstance will not, in and of itself, prove that he was a police agent.⁸¹ Thus, in *People v. Howard* the California Supreme Court ruled an informant was not a police agent because, "although [he] may have gotten the [prison] placement he desired, he had not been promised any quid pro quo in return for evidence."⁸²

OFFICERS WERE AWARE OF INFORMANT'S EFFORTS: Officers will sometimes become aware that an informant had been deliberately eliciting information from a defendant on his own initiative. The question arises: Will a police-agent relationship be inferred if they took no action to stop him? The answer appears to be no, so long as they did not encourage him to continue his efforts.

1345, 1348 ["[T]here is no evidence that the DEA in any way encouraged [the informant] to talk to Watson."].

⁷⁸ (1993) 6 Cal.4th 901, 915.

⁷⁹ See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1248 ["[A]n informant's prior working relationship with police may imply an agreement, particularly when police knew from the circumstances that the informant likely would take affirmative steps to secure incriminating information."]; *In re Williams* (1994) 7 Cal.4th 572, 597-8 ["[W]e reject petitioner's suggestion that a Sixth Amendment violation is established if only he can show that the police had a prior working relationship with [the informant]."]; *People v. Memro* (1995) 11 Cal.4th 786, 828 ["A history as an informant] does not automatically make an informant a state agent. In our view, no constitutional question arises unless the informant is an agent of the state at the time he or she elicited the statements"].

⁸⁰ See *In re Williams* (1994) 7 Cal.4th 572, 598 [prior working relationship "may, depending on the circumstances, give rise to an inference that the police encouraged the informant to elicit incriminating information"]; *In re Neely* (1993) 6 Cal.4th 901, 920 [evidence of a "preexisting relationship between [the informant] and [the officer] should have alerted competent counsel of the strong possibility that [the informant] was acting as a police agent"]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241 ["Absent evidence of direct motivation by the police in this case, or of a prior working relationship between [the informant] and the authorities from which such encouragement might be inferred, there is no basis to hold the police accountable for [the informant's] decision to question defendant." Emphasis added.].

⁸¹ See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249-50 [informant was not a police agent merely because officers and a prosecutor later testified in his behalf at the penalty phase of his capital trial]; *People v. Williams* (1997) 16 Cal.4th 153, 204 [agency relationship not established merely because the informant "subsequently received what appears to have been favorable treatment as to various penalties"]; *People v. Memro* (1995) 11 Cal.4th 786, 828 [informant was promised safe housing "after he obtained defendant's statements"]; *Schmitt v. True* (E.D. Va. 2005) 387 F.Supp.2d 622, 641 ["The relevant inquiry is whether the informant was acting on behalf of the state at the time he elicited the statement. Thus, the fact that subsequently [the informant] was given [special treatment does] not constitute consideration with respect to [the informant's] conduct at the time of taping the conversation."].

⁸² (1988) 44 Cal.3d 375, 401.

For example, in *People v. Fairbank*⁸³ an informant named Szymkiewicz, who was in custody at the San Mateo County Jail, notified officers that Fairbank had made some incriminating statements about the murder with which he had been charged. The officers listened to his report but made no promises, except to say they would talk to the DA about a “deal.” Szymkiewicz later obtained additional incriminating information from Fairbank that was used against him at trial. On appeal, the California Supreme Court rejected Fairbank’s argument that, as the result of the meeting, Szymkiewicz had become a police agent. Said the court, “[T]he police made no promises to Szymkiewicz about a possible deal, they did not direct him to obtain more information, and they did not suggest that obtaining more information would benefit him.”

Similarly, in *People v. Pensinger*⁸⁴ the defendant was charged with murdering and mutilating a five-month old girl in San Bernardino County. While being held in the county jail, Pensinger confessed to an inmate named Howard. Later, Howard notified investigators who listened to his story but did not ask him to do anything further. During the next four weeks, Howard initiated five more meetings with them, during which he reported on additional incriminating statements that Pensinger had made.

In ruling that Howard was not a police agent, the California Supreme Court said, “[T]hough the police interviewed Howard about defendant’s statements on six occasions, each interview was at Howard’s instigation.” Furthermore, said the court, the officers “repeatedly told Howard he was not their agent, and to expect no reward.”

In another San Bernardino case, *People v. Coffman*,⁸⁵ a county jail inmate named Robin Long would routinely engage other inmates in “mock fortunetelling” to elicit incriminating information. She would then pass this information along to sheriff’s deputies. The defendant, who was one of the inmates who confided in Long, argued that she should be deemed a police agent because the deputies were aware of her activities but did nothing to stop her. The court ruled, however, that this was not enough to transform Long into a police agent. What mattered, said the court, was that there was “no evidence that authorities had encouraged her to supply information or insinuated that to do so would be to her benefit, or that her release from jail was other than in the normal course for a minor parole violation.”

Finally, in *People v. Dominick*⁸⁶ the court rejected the argument that an informant was a police agent merely because he told a DA’s investigator that he would let him know if he “came across something” while he was in the county jail. As the court pointed out, “The investigator told him to ‘stay in touch’ but at no time instructed him to seek out any information from inmates concerning criminal activity . . . ”

Who are *not* police agents

INFORMANTS WORKING ON THEIR OWN: The courts regularly point out that a person who deliberately elicits information from a defendant is not a police agent if he did so on his own volition.⁸⁷ As the court explained in *People v. Catelli*, “When on his or her own

⁸³ (1997) 16 Cal.4th 1223.

⁸⁴ (1991) 52 Cal.3d 1210.

⁸⁵ (2004) 34 Cal.4th 1.

⁸⁶ (1986) 182 Cal.App.3d 1174.

⁸⁷ See *People v. Martin* (2002) 98 Cal.App.4th 408, 422-3 [“Ms. Camolinga undertook her interrogation on her own, and the officers did not know that she would do so.”]; *People v. Whitt* (1984) 36 Cal.3d 724, 742 [“[I]f an informant interrogates an accused, but acts on his own initiative rather than at the behest of the government, the government may not be said to have deliberately elicited the statements.”]; *People v.*

initiative, rather than at the state's behest, an informant obtains incriminating information from an accused, there is no unlawful interference with a defendant's Sixth Amendment right to representation free of governmental intrusion."⁸⁸

Consequently, there is no Sixth Amendment violation if an informant, victim, or anyone else comes to officers and simply tells them what a defendant said. As the court observed in *U.S. v. York*, "There is a distinct difference between passively receiving information provided by enterprising inmates and striking deals with inmates"⁸⁹

UNWITTING INFORMANTS: A person does not become a police agent merely because officers arranged to have him placed in close proximity to a defendant, knowing the defendant would likely make incriminating statements.⁹⁰ For example, in *People v. Frye*⁹¹ the defendant and Jennifer Warsing were charged with murder in Amador County. After arresting them, officers permitted Warsing and Frye to meet in a bugged visiting room. Although Warsing was cooperating in the investigation, she had not been asked to elicit information from Fry, and she did not know her conversation was being recorded. Some of the things Fry said during the conversation were used against him at trial, and the court ruled this did not violate the Sixth Amendment because "there is no evidence of a working relationship between Warsing and the Amador County police at the time Warsing's conversation with defendant took place."

"Deliberately elicit"

Even though an informant or other person is deemed a police agent, there is no Sixth Amendment violation unless he "deliberately elicited" an incriminating statement from the defendant.⁹² What constitutes "deliberate elicitation?" While interrogation and questioning would certainly qualify, so would other, more subtle, methods or tactics.⁹³ In fact, merely stimulating a general conversation about a charged crime will ordinarily

Fairbank (1997) 16 Cal.4th 1223, 1247 ["If an informant acts on his own initiative, even if he interrogates the accused, the government may not be said to have deliberately elicited the statements."]; *In re Neely* (1993) 6 Cal.4th 901, 915 ["[A] jailhouse inmate" is not a police agent "where law enforcement officials merely accept information elicited by [him] on his or her own initiative, with no official promises, encouragement, or guidance."]; *In re Wilson* (1992) 3 Cal.4th 945, 952 ["[P]etitioner does not allege that either the police or the district attorney requested at that time that [the informant] solicit information from petitioner"]; *People v. Memro* (1995) 11 Cal.4th 786, 828 ["[The informant] was gathering information on his own initiative, not that of the state. As such, he was not a government agent."].

⁸⁸ (1991) 227 Cal.App.3d 1434, 1442.

⁸⁹ (7th Cir. 1991) 933 F.2d 1343.

⁹⁰ See *People v. Champion* (1995) 9 Cal.4th 879, 909-11 [defendants were transported together, but separated from other prisoners, in bugged vehicle; *People v. Lucero* (1987) 190 Cal.App.3d 1065, 1067-8 [officers placed defendant and co-defendant in a bugged police car together]. ALSO SEE *People v. Fairbank* (1997) 16 Cal.4th 1223, 1248 [informant not a police agent merely because "a deputy district attorney intervened to prevent the sheriff's department from moving defendant away from [the informant]."].

⁹¹ (1998) 18 Cal.4th 894.

⁹² See *In re Neely* (1993) 6 Cal.4th 901, 915 ["[T]he evidence must establish that the informant . . . deliberately elicited incriminating statements."]; *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459 ["[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation."]; *Brewer v. Williams* (1977) 430 U.S. 387, 399 ["[The detective] deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him."].

⁹³ See *Fellers v. United States* (2004) 540 U.S. 519, 524 ["The Court of Appeals erred in holding that the absence of an 'interrogation' foreclosed petitioner's claim that the jailhouse statements should have been suppressed [under the Sixth Amendment]."]; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1444.

suffice.⁹⁴ As the California Supreme Court observed in *In re Neely*,⁹⁵ a Sixth Amendment violation results if the agent “stimulates conversation with a defendant relating to the charged offense or actively engages the defendant in such conversation.”

For example, in the landmark case of *Massiah v. United States*⁹⁶ the defendant and his codefendant, Colson, were indicted on federal narcotics charges. After they bailed out, Colson agreed to assist federal agents in obtaining evidence against Massiah. Specifically, he permitted them to hide a radio transmitter under the seat of his car, and he agreed to engage Massiah in a “conversation” there about their criminal activities. During the conversation, Massiah made several incriminating statements which were used against him at trial.

Although Colson did not interrogate Massiah, or even question him, the United States Supreme Court ruled that his covert activities violated Massiah’s Sixth Amendment rights. As the Court explained, a Sixth Amendment violation does not require explicit questioning. It can also result from “indirect and surreptitious interrogations” in which officers or others merely “deliberately elicit” incriminating statements.

The Court later applied this standard in *Maine v. Moulton*,⁹⁷ ruling that a wired informant had deliberately elicited incriminating statements from Moulton when, after apologizing for his poor memory, “he repeatedly asked Moulton to remind him about the details of [their crimes].” The informant also “reminisced” about events surrounding their activities and, according to the Court, “this technique too elicited additional incriminating information from Moulton.”

Similarly, in *People v. Catelli*⁹⁸ the defendant, who was in custody on several sex charges, arranged to meet with an undercover officer who was posing as a thug-for-hire. Catelli asked him to “convince” his victims to “change each of their stories.” The officer then asked “a number of questions designed to have Catelli elaborate on his request.” Catelli’s responses to these questions were used against him at his trial on the sex charges, but the court ruled they should have been suppressed because, “In repeatedly querying defendant about his proposal to silence the victims, [the officer] clearly undertook a course of conduct deliberately designed to elicit incriminating statements from defendant.”

INFERRING DELIBERATE ELICITATION: In the absence of direct evidence as to what the police agent said to the defendant, a court might find that he had deliberately elicited incriminating information if officers had given him an incentive to do so, or had otherwise created a situation in which he was likely to try. As the California Supreme

⁹⁴ See *United States v. Henry* (1980) 447 U.S. 264, 272, fn.10 [“Whether Massiah’s codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the *Massiah* Court.”].

⁹⁵ (1993) 6 Cal.4th 901, 915.

⁹⁶ (1964) 377 U.S. 201. ALSO SEE *People v. Superior Court (Sosa)* (1983) 145 Cal.App.3d 581, 597-8 [informant “did bring up the subject of the Roybal killing”]. COMPARE *People v. Roldan* (2005) 35 Cal.4th 646, 736 [deputy did not deliberately elicit when she asked the defendant “if he was going to stay out of trouble”]; *People v. Frye* (1998) 18 Cal.4th 894, 994 [“[The informant] neither questioned defendant about the murders nor encourage him to discuss the pending charges.”]; *People v. Talamantez* (1985) 169 Cal.App.3d 443, 464 [statement not deliberately elicited when it was not responsive to the informant’s question].

⁹⁷ (1985) 474 U.S. 159.

⁹⁸ (1991) 227 Cal.App.3d 1434.

Court explained, “[T]he critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused.”⁹⁹

For example, in *United States v. Henry*¹⁰⁰ the defendant was being held in the Norfolk city jail on a bank robbery charge. One of his fellow inmates was Nichols who had been working as a paid FBI informant. Moreover, he was paid “on a contingent-fee basis,” which meant he would receive nothing unless he produced “useful” information. An FBI agent who was investigating the robbery asked Nichols to “be alert” for any incriminating information from Henry, and Nichols later reported back that Henry “told him about the robbery.”

Even though there was no direct evidence that Nichols had stimulated the conversation about the robbery,¹⁰¹ the United States Supreme Court inferred he had done so because the agents had created “a situation likely to induce Henry to make incriminating statements.”

Similarly, in *In re Neely*¹⁰² the California Supreme Court inferred that a jailhouse informant had deliberately elicited information based on the following circumstances: (1) a sheriff’s deputy told him that he “was seeking specific information from [Neely] as to the whereabouts of the murder weapon,” (2) the deputy “encouraged and instructed” the informant on how he could obtain this information from Neely, and (3) he arranged for the informant and Neely to be transported together to court.

“**LISTENING POSTS**”: Because the term “deliberately elicit” includes virtually any overt act that could reasonably be expected to result in an incriminating response, a police agent’s role must be limited to that of an “ear” or “listening post.”¹⁰³

For example, in *Kuhlmann v. Wilson*¹⁰⁴ the defendant, who had been charged with robbery and murder, was placed in a jail cell with an informant named Benny Lee. Officers had asked Lee to “keep his ears open” for the names of Wilson’s accomplices. Although Wilson did not identify them to Lee, he made some admissions that were used against him at trial.

In ruling that Wilson had failed to prove that his admissions were deliberately elicited, the United States Supreme Court said:

⁹⁹ *People v. Whitt* (1984) 36 Cal.3d 724, 742.

¹⁰⁰ (1980) 447 U.S. 264. ALSO SEE *U.S. v. Sampol* (D.C. Cir. 1980) 636 F.2d 621, 638 [court inferred that an informant deliberately elicited incriminating statements from the defendant because the terms of his probation required that he “go all out” in obtaining such statements].

¹⁰¹ See *United States v. Henry* (1980) 447 U.S. 264, 287 (dis. opn. of Blackmun, J.) [“The record gives no indication that Nichols ‘stimulated’ Henry’s remarks with ‘affirmative steps to secure incriminating information.’”].

¹⁰² (1993) 6 Cal.4th 901, 917-8.

¹⁰³ See *In re Wilson* (1992) 3 Cal.4th 945, 950 [“[N]o violation of *Massiah* occurs where an informant-cellmate is simply a ‘listening post’ and does not ask questions or solicit information.”]; *People v. Williams* (1997) 16 Cal.4th 153, 205 [“[The informant] acted as a mere governmental listening post”]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249 [“[T]here is no Sixth Amendment violation when the cellmate is a passive listening post”]; *People v. Hovey* (1988) 44 Cal.3d 543, 561 [“[The informant] asked no questions of defendant nor forced any information from him.”]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 848 [“[The informant] did not question defendants but merely overheard them talking.”]; *People v. Superior Court (Sosa)* (1983) 145 Cal.App.3d 581, 596 [“[The informant’s] testimony falls short of making an effort to stimulate conversations about the crime charged”].

¹⁰⁴ (1986) 477 U.S. 436.

[A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

WHAT INSTRUCTIONS SHOULD INFORMANTS BE GIVEN? An informant or anyone else who is conducting this type of operation should be told exactly what he can and cannot do and say. It is not sufficient to tell him not to “interrogate” or “question” the defendant, or to “be yourself” or “act normal.”¹⁰⁵ As the California Supreme Court explained, “[Officers] may not disclaim responsibility for this information by the simple device of telling an informant to ‘listen but don’t ask.’”¹⁰⁶

Instead, officers should carefully explain to the informant that his job is simply to act as a listening post, and that he may do nothing to stimulate a conversation about the crime with which the defendant had been charged.

It is, of course, unrealistic to expect an informant to say absolutely nothing while the defendant is talking. It would also be highly suspicious. Still, informants should be instructed to keep their comments to a minimum, and to limit them to meaningless conversation fillers and acknowledgments of understanding or agreement; e.g., “Yeah,” “I hear you.”¹⁰⁷

IF HE IGNORES HIS INSTRUCTIONS: If the informant disregards the officers’ instructions, any incriminating statements will likely be suppressed if the officers had given him an incentive to do so.¹⁰⁸ Otherwise, the statements should be admissible.¹⁰⁹

OTHER RESTRICTIONS

In addition to restricting overt and covert questioning, the Sixth Amendment has other effects, as follows.

DEMANDS BY DEFENDANT’S ATTORNEY: After a suspect has been charged with a crime, officers must comply with his attorney’s requests and demands pertaining to future

¹⁰⁵ See *Maine v. Moulton* (1985) 474 U.S. 159, 177, fn.14 [insufficient that officers told the informant to “be himself,” “act normal,” and “not interrogate” the defendant].

¹⁰⁶ *People v. Whitt* (1984) 36 Cal.3d 724, 742.

¹⁰⁷ See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 460 [informant merely told the defendant that his story “didn’t sound too good”]; *U.S. v. York* (7th Cir. 1991) 933 F.3d 1343 [informant did not deliberately elicit merely because he responded to defendant by saying, “[Y]ou must have been pretty mad at the bitch.”]. ALSO SEE *MIRANDA* “INTERROGATION” CASES: *People v. Ray* (1996) 13 Cal.4th 313, 338 [“To the extent [the investigator] interrupted and asked questions, they were merely neutral inquiries made for the purpose of clarifying statements or points that he did not understand. Nothing in the substance or tone of such inquiries was reasonably likely to elicit information that defendant did not otherwise intend to freely provide.”]; *People v. Frank C.* (1982) 138 Cal.App.3d 708, 714 [“What did you want to talk to me about?”]; *U.S. v. Gonzales* (5th Cir. 1997) 121 F.3d 928, 940 [“[W]hen a suspect spontaneously makes a statement, officers may request clarification of ambiguous statements without running afoul of the Fifth Amendment.”].

¹⁰⁸ See *United States v. Henry* (1980) 447 U.S. 264, 270-2.

¹⁰⁹ See *Michigan v. Tucker* (1974) 417 U.S. 433, 447 [“The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.”]; *Illinois v. Krull* (1987) 480 U.S. 340, 348 [“[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.”]; *Terry v. Ohio* (1968) 392 U.S. 1, 12 [“[T]he rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct.”].

questioning. For example, questioning about the charged crime would be prohibited if the attorney said so. “[O]nce the [Sixth Amendment] right *has* attached,” said the United States Supreme Court, “it follows that the police may not interfere with the efforts of a defendant’s attorney to act as a medium between the suspect and the State during the interrogation.”¹¹⁰

On the other hand, if the suspect has not been charged, officers may safely ignore the attorney’s requests or demands.¹¹¹ For example, in *People v. Ledesma*¹¹² the defendant was arrested on probable cause for murder. While officers were driving him to the police station, his attorney phoned the station and said he did not want the officers to question his client “until such time that I should arrive,” and that he would be leaving “almost immediately.” The court did not say whether the arresting officers were notified of the attorney’s request. In any event, when they arrived, they promptly obtained a *Miranda* waiver from Ledesma and began questioning him about the murder. Some of his answers were used against him at his trial.

In ruling that the officers’ failure to honor the attorney’s request did not constitute a violation of Ledesma’s Sixth Amendment rights, the court simply noted, “[N]o criminal charges had been filed as of the date of the interrogation.”

RIGHT TO COUNSEL AT LINEUPS: A suspect has a right to have an attorney present at a lineup if, (1) the suspect was charged with the crime under investigation, and (2) the witness will see or hear the suspect in person.¹¹³ Four things should be noted about this right. First, the defendant does not have a right to have counsel present during photo or videotaped lineups.¹¹⁴ Second, the defendant has a right to counsel at a lineup even though he had not requested one. Third, a defendant may waive his right to counsel at a lineup if he has not yet invoked it.¹¹⁵

Fourth, the attorney’s role is limited to that of a “silent observer”¹¹⁶ who merely takes note of any suggestiveness in the lineup procedure so that he can assist the defense in challenging the lineup in court.¹¹⁷ As Justice Mosk explained in *People v. Williams*:

¹¹⁰ *Moran v. Burbine* (1986) 475 U.S. 412, 428.

¹¹¹ See *Moran v. Burbine* (1986) 475 U.S. 412, 429, fn.3; *People v. Duck Wong* (1976) 18 Cal.3d 178; *People v. Johnson* (1992) 3 Cal.4th 1183, 1222-3; *People v. Saidi-Tabatabai* (1970) 7 Cal.App.3d 981, 985

[“Unquestionably, it would have been the more ‘sporting’ thing for the police to stop the interrogation after the receipt of the [attorney’s] telephone call, but, as has been pointed out: ‘The investigation and detection of crime is not a game which one side must play according to the more rigorous standards of fair play, while no holds are barred for the other.’”]; *U.S. v. Powe* (9th Cir. 1993) 9 F.3d 68, 70 [officers did not violate the Sixth Amendment when they conducted covert interrogation of the defendant after his attorney sent them a letter requesting “that all contacts by investigators with Mr. Powe be conducted through [his attorney]”].

¹¹² (1988) 204 Cal.App.3d 682.

¹¹³ See *Moore v. Illinois* (1977) 434 U.S. 220, 229 [suspect at one-on-one ID will have a right to counsel if he has been formally charged with the crime under investigation]; *People v. Reese* (1981) 121 Cal.App.3d 606, 612 [charged suspect has right to counsel at live voice lineup].

¹¹⁴ See *Patterson v. Illinois* (1988) 487 U.S. 285, 298.

¹¹⁵ See *United States v. Wade* (1967) 388 U.S. 218, 237; *Michigan v. Harvey* (1990) 494 U.S. 344, 352; *Brewer v. Williams* (1977) 430 U.S. 387, 405; *Michigan v. Jackson* (1986) 475 U.S. 625, 631; *Patterson v. Illinois* (1988) 487 U.S. 285, 290, fn.3; *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1159-60. **NOTE:** To waive his rights, the suspect must be advised of, and waive, the following, (1) you have a right to have counsel present at the lineup, (2) you are not required to participate in the lineup without counsel, and (3) if you want to have an attorney present, one will be appointed at no charge if you cannot afford one. See *United States v. Wade* (1967) 388 U.S. 218, 237; *People v. Wells* (1971) 14 Cal.App.3d 348, 354; *People v. Banks* (1970) 2 Cal.3d 127, 134; *People v. Thomas* (1970) 5 Cal.App.3d 889, 897.

¹¹⁶ See *People v. Bustamante* (1981) 30 Cal.3d 88, 99, fn.7.

[D]efense counsel has no affirmative right to be active during the course of the lineup. He cannot rearrange the personnel, cross-examine, ask those in the lineup to say anything or to don any particular clothing or to make any specific gestures. Counsel may not insist law enforcement officials hear his objection to procedures employed, nor may he compel them to adjust their lineup to his views of what is appropriate.¹¹⁸

Because the attorney has a right to be present throughout the lineup, he has a right to watch and listen when the witness is asked if he can identify the perpetrator.¹¹⁹ He does not, however, have a right to be present when officers interview the witness after he made or failed to make an ID,¹²⁰ nor does he have a right to be present during interviews with witnesses before the lineup.¹²¹

CONSENT SEARCHES: Officers may not seek consent to search from a defendant if, (1) he had been charged with the crime under investigation, and (2) he had invoked his right to counsel.¹²²

PLEA NEGOTIATIONS: Prosecutors may not negotiate a plea or sentence with a represented defendant if the plea or sentence concerns a charged crime.¹²³

SUPPRESSION OF STATEMENTS

In determining whether a statement may be suppressed on Sixth Amendment grounds, the courts will apply the following rules and principles.

STANDING: The statement may be suppressed only if the statement was made by the defendant. In other words, a defendant may not challenge the admissibility of a statement on Sixth Amendment grounds if it was made by someone else.¹²⁴

¹¹⁷ See *United States v. Ash* (1973) 413 U.S. 300, 312; *United States v. Wade* (1967) 388 U.S. 218, 230-1, 236; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 786; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 791; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 121; *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 221; *People v. Carpenter* (1997) 15 Cal.4th 312, 368 [“Defendant cites no authority that defense counsel must be given time to scrutinize the police reports before the lineup.”].

¹¹⁸ (1971) 3 Cal.3d 853, 860 (dis. opn. of Mosk, J.). ALSO SEE *People v. Bustamante* (1981) 30 Cal.3d 88, 99, fn.7; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 [“As Justice Mosk’s strong dissent, joined by two others, noted, defense counsel must not be allowed to interfere with a police investigation.”].

¹¹⁹ See *People v. Williams* (1971) 3 Cal.3d 853; *People v. Harmon* (1989) 215 Cal.App.3d 552, 566; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 [court distinguishes *Williams*]; *People v. Malich* (1971) 15 Cal.App.3d 253, 261 [“[T]he attorney’s exclusion from the actual identification after the lineup emasculates the lineup and vitiates an in-court identification based upon it.”].

¹²⁰ See *People v. Perkins* (1986) 184 Cal.App.3d 583, 591 [“[S]ince the identification process had been completed, Perkins’ counsel had no more right to be present at the interview than he would at any nonconfrontational identification by a victim. No defendant has the right to demand representation by counsel at every interview between the prosecution and its witness.”]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1067 [“The premise of defendant’s argument—that the lineup identification was not complete until [the follow up interview]—is plainly incorrect. the lineup identification procedure was complete when [the victim] filled out and signed the identification card, indicating her identification of defendant, qualified by a question mark.”]; *People v. Carpenter* (1997) 15 Cal.4th 312, 368-9.

¹²¹ See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1045.

¹²² See *Tidwell v. Superior Court* (1971) 17 Cal.App.3d 780, 789-90. **COMPARE** *People v. Williams* (1980) 114 Cal.App.3d 67, 77-8.

¹²³ See *People v. Hayes* (1988) 200 Cal.App.3d 400, 409 [“[W]hen the state knowingly chooses to negotiate directly with a represented defendant on the case he is represented on, the state is seizing an opportunity in violation of the defendant’s Sixth Amendment right to counsel.”].

¹²⁴ See *Texas v. Cobb* (2001) 532 U.S. 162, 171, fn.2 [“The Sixth Amendment right to counsel is personal to the defendant”]; *Faretta v. California* (1975) 422 U.S. 806, 819-20; *People v. Badgett* (1995) 10 Cal.4th 330,

“CRIME SPECIFIC”: As discussed earlier in the section on the “Crime Specific Rule,” statements may be suppressed only if they were obtained during overt or covert questioning about the crime with which the defendant was charged.

SUPPRESSION OF STATEMENT TO PROVE GUILT: If the defendant had standing, and if the statement pertained to the charged crime, the statement cannot be used by prosecutors in their case-in-chief to prove his guilt.¹²⁵

SUPPRESSION OF RESULTING EVIDENCE: If officers obtain a statement in violation of the Sixth Amendment, the admissibility of evidence discovered as the result of the statement is determined by applying the Fourth Amendment’s “Fruit of the Poisonous Tree” rule. Thus, the evidence will not be suppressed if the taint from the violation had been sufficiently attenuated.¹²⁶

SUPPRESSION OF SUBSEQUENT STATEMENTS: If officers obtained a statement in violation of the Sixth Amendment but later obtained one in compliance (e.g., suspect initiated the questioning and waived his rights), there is a case in which the court held the second statement was admissible under the *Miranda* rule of *Oregon v. Elstad*.¹²⁷

The case is *U.S. v. Fellers*,¹²⁸ and it began when officers in Nebraska arrested Fellers in his home after he was indicted for conspiracy to distribute methamphetamine. Before transporting him to the police station, they questioned him about the conspiracy, and he made an incriminating statement. The officers did not, however, obtain a *Miranda* waiver, which meant the statement was obtained in violation of the Sixth Amendment, as well as *Miranda*. After booking him, officers interviewed him again, but this time they obtained a waiver. He then made some additional incriminating statements.

The statement Fellers made at his home was, of course, suppressed on both *Miranda* and Sixth Amendment grounds because he had not waived his rights. The issue was whether the subsequent statement was admissible. Although Fellers had waived his *Miranda* (and Sixth Amendment) rights before making the statement, he argued that it should have been suppressed because it was the “fruit” of the Sixth Amendment violation that occurred in his home. The court disagreed, ruling that because the subsequent statement was obtained in compliance with *Miranda* and the Sixth Amendment, and because it was made voluntarily, it was admissible under *Elstad*. Said the court, “[T]he *Elstad* rule applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel, notwithstanding earlier police questioning in violation of the Sixth Amendment.”

INADVERTENT ELICITING: If, during an investigation into an uncharged crime, officers or police agents inadvertently elicited an incriminating statement pertaining to a crime

343-4; [“The right to counsel is a personal right, and a violation of that right cannot ordinarily be asserted vicariously.”].

¹²⁵ See *Michigan v. Jackson* (1986) 475 U.S. 625; *Michigan v. Harvey* (1990) 494 U.S. 344, 345; *In re Wilson* (1992) 3 Cal.4th 945, 951.

¹²⁶ See *Wong Sun v. United States* (1963) 371 U.S. 471, 487-8 [“[The issue] is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”]; *United States v. Fellers* (2004) 540 U.S. 519, 524; *U.S. v. Montgomery* (4th Cir. 2001) 262 F.3d 233, 248. ALSO SEE Fall 2003 *Point of View* (“Averting Evidence Suppression,” “Attenuation”).

¹²⁷ (1985) 470 U.S. 298, 318. ALSO SEE *Michigan v. Harvey* (1990) 494 U.S. 344, 351; *People v. Wash* (1993) 6 Cal.4th 215, 241 [“[W]e have adopted [*Elstad*] as the standard in California”].

¹²⁸ (8th Cir. 2005) 397 F.3d 1090.

with which the defendant had been charged, the statement cannot be used to prove the defendant's guilt as to the charged crime.¹²⁹

IMPEACHMENT: A statement obtained in violation of a defendant's Sixth Amendment rights may be used to impeach him at trial if he had waived his Sixth Amendment rights.¹³⁰ If the defendant did not waive his rights, there is a split of opinion as to whether his statement would be admissible for impeachment. In two cases where a police agent obtained a voluntary statement (without, of course, obtaining a waiver), the courts ruled the statements were inadmissible for any purpose.¹³¹ But in a more recent case, the court ruled such a statement was admissible for impeachment.¹³² Meanwhile, the United States Supreme Court has declined to resolve the issue.¹³³

ETHICS ISSUES FOR PROSECUTORS

It is a violation of the California Rules of Professional Conduct for prosecutors to interview or otherwise communicate directly or indirectly with a defendant who is represented by counsel if, (1) the communication concerns a crime for which he is represented, and (2) the defendant's attorney had not consented to the communication.¹³⁴

What if the suspect was *not* charged? In the opinion of the California Attorney General, the CDAA's Ethics Committee, and several federal circuit courts, *ex parte* communications would be permissible.¹³⁵ It is possible, however, that an ethical violation might result if the case was ready for charging, but prosecutors intentionally delayed filing a complaint in order to circumvent this rule.¹³⁶ POV

¹²⁹ See *Maine v. Moulton* (1985) 474 U.S. 159, 180 ["To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations"]; *In re Wilson* (1992) 3 Cal.4th 945, 951 ["Incriminating statements obtained in circumvention of a defendant's right to counsel with respect to a charged offense are inadmissible at the trial of that charged offense even if they pertain to a new and uncharged crime."].

¹³⁰ See *Michigan v. Harvey* (1990) 494 U.S. 344; *People v. Brown* (1996) 42 Cal.App.4th 461, 472-3; *People v. Harper* (1991) 228 Cal.App.3d 843, 853; *People v. Cribas* (1991) 231 Cal.App.3d 596, 606.

¹³¹ *People v. Cribas* (1991) 231 Cal.App.3d 596, 606; *People v. Harper* (1991) 228 Cal.App.3d 843.

¹³² *People v. Brown* (1996) 42 Cal.App.4th 461, 471-2.

¹³³ See *Michigan v. Harvey* (1990) 494 U.S. 344, 354 ["[W]e need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel."].

¹³⁴ See Rule 2-100, California Rules of Professional Conduct. **NOTE re suborning perjury:** It appears this rule would not prohibit *ex parte* communication with a represented person who initiated a discussion with prosecutors concerning attempts by other parties or their attorneys to suborn perjury in the case. See *U.S. v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1140 ["It would be an anomaly to allow subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice."].

¹³⁵ See 75 Ops.Cal.Atty.Gen. 223, 232; *Professionalism*, A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (2001, California District Attorneys Association) pp. VI-6 et seq.; Standard 24.6, National Prosecution Standards, Second Edition, 1991 [NPS-II] [Communications with Represented Defendants during Investigations]; *U.S. v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1338-9; *U.S. v. Powe* (9th Cir. 1993) 9 F.3d 68; *U.S. v. Fitterer* (8th Cir. 1983) 710 F.2d 1328, 1333; *U.S. v. Ryans* (10th Cir. 1990) 903 F.2d 731, 739-40.

NOTE: If a communication between a prosecutor and a represented suspect is permitted by the Rules of Professional Conduct, prosecutors should nevertheless consider having a DA's inspector or other law enforcement officer conduct the interview, or at least be present as a witness during the interview.

¹³⁶ See *U.S. v. Talao* (9th Cir. 2000) 222 F.3d 1133.